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SUPREME COURT, U.S.

Nos. 06-1039 & 06-1204

In The Supreme Court of the United States

ESTATE OF ROGER ROXAS, *et al.*,

Petitioners,

v.

MARIANO J. PIMENTEL,

Respondent.

REPUBLIC OF THE PHILIPPINES, *et al.*,

Petitioners,

v.

MARIANO J. PIMENTEL, *et al.*,

Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts followed the test set out in Rule 19(b) of the Federal Rules of Civil Procedure and in *Provident Tradesmens Bank & Trust Co. v. Patterson* in concluding that the Republic of the Philippines and its PCGG were not indispensable parties to this interpleader litigation.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Two petitions for writ of certiorari were filed in this matter, No. 06-1039 and No. 06-1204. Respondents to both petitions are Mariano J. Pimentel and a Class of 9,539 Filipino Human Rights Victims. Petitioners are Republic of the Philippines, Philippine Presidential Commission on Good Government, Philippine National Bank, and Arelma, Inc. (No. 06-1204), and The Estate of Roger Roxas and the Golden Budha Corporation (No. 06-1039). Petition No. 06-1204 identifies The Estate of Roger Roxas and the Golden Budha Corporation as additional Respondents.

Petitioner, Republic of the Philippines ("Republic"), owns 16% of the outstanding stock of Petitioner, Philippine National Bank ("PNB"), and elects 4 of its 11 directors. Rogel Zenorosa Dep. at 9-12. The Republic is party to an escrow agreement with PNB whereby PNB acts on behalf of the Republic, at the Republic's expense and at the Republic's instructions regarding Arelma. *Id.* All the outstanding shares of Arelma, a Panamanian corporation, are currently held by PNB pursuant to the escrow agreement, and the directors of Arelma are elected either directly or indirectly by the Republic and its agency, the Presidential Commission on Good Government. *Id.* at 25-36.

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STATEMENT OF THE CASE

The judgment in this statutory interpleader action awarded approximately $35 million in an account at Merrill Lynch, Pierce, Fenner & Smith, Inc., to the Class of 9,539 victims of grave human rights abuses during the 1972-86 martial-law regime of Ferdinand E. Marcos in the Republic of the Philippines ("Republic"). The Class members were seeking to collect on their judgment of almost $2 billion rendered in an historic human rights action, *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767 (9th Cir. 1996); ROP App. 49a, 53a.[1] The Class members, including heirs of victims, represented in this action by Mariano Pimentel, are those who were "subjected to hideous tortures," "summarily executed" or "simply disappeared." ROP App. 45a; *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1462-63 (D. Hi. 1995) (listing specific forms of torture used). They were victims of "massive *jus cogens* human rights abuses for which Marcos was responsible." ROP App. 53a. But for the filing of the petitions for certiorari in this Court, the Class members, most of whom live in poverty, would have already received a court-ordered first installment of $2,000 each from the assets at issue. Order of 6/27/2006 at 3 (Dkt. No. 409).

While Marcos was concealing and investing his own assets during martial law, he orchestrated and directed massive human rights abuses. ROP App. 53a. Marcos directly controlled all military and para-military groups in the Philippines. ROP App. 44a-45a. "By his Order, tens of thousands of persons were arrested and detained without charges and without the right of habeas corpus. Thousands were subjected to hideous tortures. Thousands more

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[1] Citations to the record, where relevant, are preceded by the abbreviation of each petitioner's name: ROP for the Republic and GBR for Golden Budha/Roxas. "Dkt. No." refers to the corresponding official docket entry numbers in the interpleader action filed in the District Court of Hawaii, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Arelma Inc., et al.*, No. 00-595 (D. Hi. 2000).

were summarily executed and others simply 'disappeared.'" ROP App. 45a. As the District Court found:

> The abuse committed against Plaintiff Pimentel by the Philippine military is illustrative of the claims of the class he represents. Pimentel was arrested two weeks after the declaration of martial law. During the next six years he was held in detention centers for four years with no charges against him. On his trip home from his final detention, the military kidnapped him. They beat him with rifles breaking his teeth, an arm and a leg, and dislocating ribs. They then took him to a remote sugar cane field, buried him up to his neck and left him for dead.

ROP App. 48a.

Merrill Lynch brought this interpleader action on September 14, 2000[2] to determine the entitlement to Merrill Lynch securities account No. 165-07312 established by Ferdinand E. Marcos in 1972 in the name of Arelma Inc.

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[2] The Republic's assertion of "manufactured" jurisdiction is bogus. Pimentel and the Class of Human Rights Victims sued Merrill Lynch in federal court in Hawaii on September 6, 2000 regarding the assets in Arelma's securities trading account. Order of 3/22/2001 at 6 (Dkt. No. 56). Merrill Lynch then filed the present interpleader complaint on September 14, 2000 in the federal court in Hawaii as a result of an agreement reached with Pimentel's counsel to interplead the assets into that court in return for dismissal of the September 6 lawsuit without prejudice. Compl. for Interpleader (Dkt. No. 1). At a conference in the MDL action on September 11, 2000, the judge encouraged this solution in the presence of counsel for the Republic. Judges often urge such solutions. *See Texaco, Inc. v. Ponsoldt*, 118 F.3d 1367, 1368 (9th Cir. 1997) (as part of a settlement agreement the District Court urged the filing of an interpleader). Merrill Lynch sought the District Court's advice to avoid any issue of whether a transfer of the assets would violate the permanent injunction contained in the Class' 1995 Judgment. *See Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 762 (9th Cir. 1996) (affirming contempt citation for violating permanent injunction). A separate federal judge in Hawaii, ruling on the Republic's recusal motion, found "the court did not direct, order, or require Merrill Lynch to file the instant action" and noted that "[t]he Court concurred with Plaintiffs' Class that the action should be filed in the District of Hawaii." Dkt. No. 56 at 5-6.

("Arelma"), a sham corporation incorporated in Panama for the purpose of hiding actual ownership of these assets. ROP App. 46a-47a. The account was begun with $2,000,000 provided by Marcos, and in the intervening years grew to about $35,000,000. ROP App. 45a-46a. The assets were deposited in the U.S. District Court of Hawaii for the purpose of this litigation. ROP App. 46a.

The record in this case, developed through four years of protracted and contentious litigation, contains undisputed evidence that the Merrill Lynch account was established at the explicit direction of Marcos with funds he provided. "Arelma is a shell corporation" (ROP App. 10a); "[Ferdinand E.] Marcos controlled Arelma during his lifetime" (ROP App. 48a); "Arelma was incorporated to receive funds owned by Ferdinand Marcos" (ROP App. 48a); and, "[t]he source of those funds [in the Merrill Lynch account] was Ferdinand E. Marcos." ROP App. 45a. "The purpose of incorporating Arelma was to receive funds owned by Ferdinand E. Marcos, and there is no evidence the funds deposited in the Arelma account at Merrill Lynch were not the property of Ferdinand E. Marcos." ROP App. 53a.

As the District Court found, the Republic knew about the securities trading account at the Merrill Lynch account since at least 1986. In 1987 the Republic obtained an injunction from a federal court in New York freezing the account. ROP App. 47a; Order of 8/14/2003 (ROP App. 56a). Although the Republic filed a dozen or more lawsuits in courts throughout the United States seeking to recover various Marcos assets, it never filed a lawsuit to recover the Merrill Lynch account. ROP App. 58a. The Republic participated in at least one other interpleader proceeding in the United States involving a Picasso painting allegedly owned by Marcos. *Republic of the Philippines v. Christie's*, No. 98-3871 (S.D.N.Y. 1998). The Republic never asserted its sovereign immunity in any of those proceedings. *See, e.g.*, ROP App. 47a.

There was no evidence in discovery or at trial that supported the Republic's position that the monies were "misappropriated" or "stolen" as alleged in the Republic's

Petition. At no time has the Republic ever come forth with evidence that the money at issue belonged to it. Although the Republic did not participate directly in the interpleader after the Republic's dismissal from the litigation, it participated indirectly since (a) after 2000, it controlled Arelma, worked with Arelma's counsel, and paid for Arelma's prosecution of the litigation, and (b) it controlled the escrow agent, Philippine National Bank ("PNB"), owned 16% of PNB's stock, and elected 4 of its 11 directors. Rogel Zenarosa Dep. at 9-12. Neither Arelma nor PNB ever garnered evidence supporting the Republic's allegation that the Merrill Lynch account derived from the Republic's assets.[3] ROP App. 53a.

The Republic moved to dismiss itself on sovereign immunity grounds in this litigation only after losing a motion to recuse the judge assigned to the case. *See* Dkt. No. 56. After being dismissed as a party, the Republic, as a nonparty, persisted in delaying and staying the litigation by filing numerous motions, mandamuses and appeals.[4] The Republic's persistent refrain – that Philippine courts would soon rule on entitlement to the interpleaded assets – resulted in stays of proceedings totaling 17 months. One stay was terminated by the District Court when Pimentel conclusively showed the Court that there was no case pending in the Philippines seeking determination of the ownership of the Merrill Lynch account. ROP App. 56a-57a. Four days after entry of the July 12, 2004 judgment herein, the Republic filed new motions in the Philippines to reopen long closed litigation there to have a Philippine court countermand the District Court's award of the assets

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[3] The Republic's representation that the assets in the Arelma account were a "subset" (ROP Pet. at 4) of the two stock certificates controlled by Swiss authorities is legally and factually wrong. The Swiss government never had possession or control of the assets in the Merrill Lynch account. ROP App. 46a. As a legal matter, a stockholder does not own or control the assets of the corporation. *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003); ROP App. 52a.

[4] This Court held in *Karcher v. May*, 484 U.S. 72, 77 (1987), that a nonparty has no standing to appeal.

at issue to the Class of Filipino victims. After almost three years, the Philippine court still has not ruled on the motion.

In an earlier appeal, *In re Republic of the Philippines*, 309 F.3d 1143 (9th Cir. 2002), the Ninth Circuit agreed that the Republic was entitled to dismissal on sovereign immunity grounds, and even held the Republic was a necessary party pursuant to Rule 19(a) of the Federal Rules of Civil Procedure. However, it declined to accept the Republic's argument that it was an indispensable party to this litigation pursuant to Rule 19(b). *Id.* at 1153. On remand, the District Court made detailed findings and conclusions holding the Republic was not an indispensable party. ROP App. 58a-60a. An interlocutory appeal on that issue was denied by the Ninth Circuit on February 20, 2004 (Dkt. No. 375), clearing the way for a trial.

At trial, Pimentel and the Class prevailed in proving that Arelma was an *alter ego* of Ferdinand Marcos and that their claim, based on their 1995 judgment against the Marcos Estate, had priority to the interpleaded assets. ROP App. 53a-54a. PNB's claim, based on ownership of the Arelma stock certificates, was denied based on this Court's decision in *Dole Food Co.*, 538 U.S. 468 (2003), that an individual shareholder does not own a corporation's assets. ROP App. 52a. The claims of the Roxas Estate and the Golden Budha Corporation were denied since (a) their prior judgments were not against Ferdinand Marcos or his Estate, and (b) they failed to prove the assets in the Merrill Lynch account derived from property stolen from them. ROP App. 53a-54a. The Roxas Estate and the Golden Budha Corporation took virtually no discovery during the litigation and attempted at trial to use deposition transcripts from a separate state court action in violation of FRE 804(b)(1), and expert testimony without complying with Rule 26(a)(2). ROP App. 10a-11a.

The Ninth Circuit affirmed the judgment in favor of Pimentel and the Class. ROP App. 11a. Addressing the issue of whether the Republic was an indispensable party, the Ninth Circuit engaged in a *de novo* balancing of the factors set forth in Rule 19(b). ROP App. 4a-10a. Balancing

those factors and applying equity and good conscience, as mandated by the Rule, the Ninth Circuit concluded the Republic was not an indispensable party. ROP App. 10a. The overriding consideration in that Court's opinion was that the Republic had no likelihood of recovering the assets since (a) its claim in the United States would be barred by the applicable statute of limitations and (b) a decision of a Philippine court would not be enforced in a United States court because of a prior decision by a United States court which possessed *in rem* jurisdiction over the interpleaded assets. ROP App. 8a-10a.

The Ninth Circuit rejected the arguments of the Roxas Estate and the Golden Budha Corporation finding the District Court had properly excluded proffered evidence for failure to comply with the Federal Rules of Procedure and the Federal Rules of Evidence. ROP App. 10a-11a. Their remaining arguments were deemed specious by the Ninth Circuit.

The Republic further protracted this litigation and a distribution of $2,000 to thousands of its citizens by filing two motions for reconsideration and *en banc* review. ROP App. 1a. Now, after failing to persuade any of the 27 jurists who have examined its position, the Republic has filed a petition for certiorari with this Honorable Court.

REASONS FOR DENYING THE PETITION

I. THE NINTH CIRCUIT CORRECTLY APPLIED WELL-SETTLED LAW IN REACHING THE DETERMINATION THAT THE REPUBLIC OF THE PHILIPPINES WAS NOT AN INDISPENSABLE PARTY UNDER RULE 19(b)

A. The Ninth Circuit Properly Engaged in a *de novo* Balancing Pursuant to Rule 19(b) and the *Provident Tradesmens Bank & Trust Co.* Decision

The courts below followed Rule 19(b) of the Federal Rules of Civil Procedure in determining whether the Republic of the Philippines was an indispensable party to the interpleader action:

> ***Rule 19(b). Determination by Court Whenever Joinder not Feasible.*** If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment, rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b). The language of this rule explicitly requires a court to makes its decision "in equity and good conscience" by balancing a series of factors in the context of the dispute needing resolution. *Id.*

In affirming the District Court's ruling, the Ninth Circuit followed this Honorable Court's decision in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 109, 118 (1968),[5] which instructed courts to look through "the lens of 'equity and good conscience'" and thus to determine indispensability "'in the context of [this] particular litigation.'" *Merrill Lynch, Pierce, Fenner and Smith, Inc. v. ENC Corp.*, 464 F.3d 885, 891 (9th Cir. 2006); ROP App. 4a-5a. This Court explained in *Provident Tradesmens Bank* that a decision on whether a party is "indispensable" "must be based on *factors varying with the different cases*, some such factors being substantive, some procedural, some compelling by themselves, and some

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[5] The Republic has acknowledged that Justice Harlan's opinion for a unanimous court in *Provident Tradesmens Bank* is the "leading decision on Rule 19(b)." ROP Pet. at 12.

subject to balancing against opposing interests." 390 U.S. at 118-19 (emphasis added). The *Provident Tradesmens Bank* decision notably explained that "[a]fter trial, considerations of efficiency" such as "the time and expense" involved in the trial militate in favor of denying a Rule 19(b) motion. *Id.* at 111. The Ninth Circuit quoted from *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944), for the proposition that the "equity" called for in Rule 19(b) requires courts to exercise "flexibility . . . marked by 'mercy and practicality.'" ROP App. 6a.

The Ninth Circuit thus examined the "circumstances and practicalities of the Republic's claim" to determine whether the judgment rendered in its absence "'might be prejudicial to [it] or those already parties.'" ROP App. 4a (*quoting* Rule 19(b)). It then examined two specific scenarios that could follow if the Republic were deemed indispensable, and concluded that "it is doubtful that the Republic has any likelihood of recovering the Arelma assets" because "[t]he res is in the United States" and "[i]t cannot be finally disposed of except by the judgment of a court in the United States." ROP App. 7a-8a. This conclusion was reinforced by the Ninth Circuit's recognition that any effort by the Republic to pursue the Arelma assets in an action against Merrill Lynch in New York would be barred by New York's six-year statute of limitations. ROP App. 8a (*citing* N.Y. C.P.L.R. § 213, and also *citing* *Provident Tradesmens Bank*, 390 U.S. at 115, for the proposition that the Republic's "failure to secure a judgment affecting these assets is a factor to be taken into account"). The Ninth Circuit explained that any judgment the Republic might obtain in the Philippines would be unenforceable, because the Philippine court would have no jurisdiction over the *res* – the Arelma assets – and if a Philippine court were to issue a ruling regarding these assets "a court of this country would not be bound to give it effect." ROP App. 8a.[6] *See also Merrill Lynch, Pierce,*

[6] The conclusion that only a U.S. court can adjudicate claims to assets held in the United States flows from the most basic principles of

(Continued on following page)

Fenner and Smith, Inc. v. ENC Corp., 467 F.3d 1205, 1207 (9th Cir. 2006), where the Ninth Circuit noted that the Philippine Supreme Court had previously "categorically declared" that its forfeiture proceeding regarding Marcos assets "is *in rem*," citing *Republic of the Phil. v. Hon. Sandiganbayan*, G.R. No. 152154 (Phil. Nov. 18, 2003) and RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 482(2)(a) (1987) for the proposition that "any judgment made without proper jurisdiction is unenforceable in the United States."[7] The Ninth Circuit

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due process recognized in all legal systems. As a prominent Philippine writer has explained, Philippine law agrees with these concepts of due process:

> . . . authority to hear and decide cases may be based on a number of factors: the presence, submission, or appearance of the parties or one of them; the doing of certain acts within the State; *the fact that the property involved in the litigation is in the forum*; or the fact that the parties are either citizens or residents of the State. *In the absence of such minimum contacts, a judgment rendered by the court of one State may be refused recognition by other States.*

JOVITO SALONGA, PRIVATE INTERNATIONAL LAW 38 (1979, reprinted 1981) (emphasis added). *See also id.* at 40 (explaining that in an *in rem* action "the State may render through its courts a valid judgment, as long as it has jurisdiction over the thing even though it may not have personal jurisdiction over the persons whose interests are affected"), and at 41-47 (explaining that Philippine jurisdictional principles have evolved from the concepts laid down in *Pennoyer v. Neff*, 95 U.S. 714 (1877), and its progeny).

[7] The Republic's Petition acknowledges that the Philippine Supreme Court has previously declined to render any ruling regarding the Arelma assets (ROP Pet. at 4), but nonetheless contends that this matter "is now pending before the Sandiganbayan and will be resolved by that court or the Philippine Supreme Court." ROP Pet. at 5. The Philippine courts surely understand, however, that they do not have jurisdiction to render a ruling regarding the Arelma assets, and they are unlikely to issue a ruling that would so flagrantly violate recognized standards of due process and jurisdiction.

The District Court explicitly found as a factual matter that the Republic made no claim for relief regarding the Arelma assets in the 1991 petition filed by the Republic that led to the 2003 decision of the Philippine Supreme Court: "There is no claim in that lawsuit seeking forfeiture of the assets in the Arelma account at Merrill Lynch." ROP

(Continued on following page)

also noted that the Republic is not bound by the present proceeding, "because it is not a party to the action," and that it is not formally prejudiced, because it remains free to pursue a claim against Merrill Lynch in the United States (although its odds of success are extremely low because of New York's six-year statute of limitations). ROP App. 8a-9a.

The Ninth Circuit completed the balancing process required by Rule 19(b) by concluding that "[b]ecause the Republic has little practical likelihood of obtaining the Arelma assets, there is no need to lessen prejudice to it" (ROP App. 9a); that although the Arelma assets are not adequate to satisfy the Human Rights Victims $2 billion award, nonetheless "the symbolic significance of some tangible recovery is not to be disregarded, and if the recovery is distributed pro rata among the individuals, it will have monetary meaning for the poor among them" (ROP App. 9a); that if this interpleader were to have been dismissed on the basis of indispensability, the Human Rights Victims would have no forum open to them in the Philippines[8] (ROP App. 9a); and that they could sue in New

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App. 56a. The Republic's failure to claim these assets likely resulted from its recognition that no Philippine court could exercise jurisdiction over assets that were in the custody of the United States District Court for the District of Hawaii.

[8] The existence of an adequate alternative remedy for the litigants if an action were to be dismissed is "[p]erhaps the factor most important to a court in determining whether to proceed or dismiss, in the absence of a person who should be joined but cannot be made a party." Jean F. Rydstrom, *Validity, Construction, and Application of Rule 19(b) of Federal Rules of Civil Procedure, as Amended in 1966, Providing for Determination to Be Made by Court to Proceed with or Dismiss Action When Joinder of Person Needed for Just Adjudication Is Not Feasible*, 21 A.L.R. Fed. 12 (1974) § 12(a). The Human Rights Victims are barred from the forfeiture litigation in the Philippines. The District Court specifically found that other parties have no standing to participate in Philippine court forfeiture proceedings between the Republic and the Marcoses (ROP App. 59a), and the Republic has acknowledged this. ROP Pet. at 24 n.10. Due process and equity require that an alternative forum be one in which all parties can participate, not one where just two parties decide how to slice up the money to the exclusion of other claimants.

York but that would impose "a needless repetition that will not benefit the Republic." ROP App. 9a. The Ninth Circuit noted that it would be unrealistic to direct the Human Rights Victims to "find redress from their own government" because – despite the passage of 21 years since Marcos was forced out of office – "the Republic has not taken steps to compensate these persons who suffered outrage from the extra-legal acts of a man who was the president of the Republic." ROP App. 9a-10a. The Ninth Circuit then concluded that "[n]o injustice is done [to the Republic] if it now loses what it can never effectually possess." ROP App. 9a.

B. Foreign Sovereigns Are Not Entitled to Privileged Status Under Rule 19

The Republic's contention that an assertion of sovereign immunity requires a finding of indispensability is not supported by case law. ROP Pet. at 13. In fact, *the Republic does not cite to a single instance in which a case was dismissed on the basis of a foreign government's assertion of both sovereign immunity and indispensability.*

Numerous cases can be cited where litigation has continued despite assertions of immunity by sovereign parties, including, *e.g.*, *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 798 N.E.2d 1047, 1058 (N.Y. 2003) (ruling that although a tribe protected by sovereign immunity had interests that would be affected by the litigation, the tribe should not be deemed an indispensable party because that would leave the public with no effective remedy against constitutional violations and other abuses by the executive branch),[9] and *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1118-20 (E.D. Cal. 2002), *aff'd on other grounds*, 353 F.3d 712 (9th

[9] The court explained: "While we fully respect the sovereign prerogatives of the Indian tribes, we will not permit the Tribe's voluntary absence to deprive these plaintiffs (and in turn any member of the public) of their day in court." *Id.* at 1058-59.

Cir. 2003) (ruling that although the immune tribes "can claim a legal interest in this lawsuit," the claim could proceed without them because their interest would be represented by another party). This Court explained in *Provident Tradesmens Bank* why the "deemed conclusive of indispensability" approach advocated by the Republic is misguided, explaining that a court does not know whether a particular party is indispensable until it has examined the situation to determine whether it can proceed without the party: "a court does not know whether a particular person is 'indispensable' until it had examined the situation to determine whether it can proceed without him." 390 U.S. at 119.[10]

The cases involving the immunity of the United States, the 50 states, and Indian tribes cited by the Republic are not analogous to the present situation, because Indian tribes, the 50 states, and the federal government operate within the jurisdiction of the United States and, if a case is dismissed after an assertion of sovereign immunity, other means exist to address and resolve the dispute. In *Dawavendewa v. Salt River Project Agric. Improvement*

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[10] A fact situation somewhat analogous to the present matter is found in *Lord Day & Lord v. Socialist Republic of Vietnam*, 134 F. Supp. 2d 549 (S.D.N.Y. 2001), which illustrates the pragmatic approach that courts have taken in interpleader actions. The plaintiff law firm brought an interpleader action to determine the proper recipient of settlement funds that had previously been transferred to the firm from the Panama Canal Company after a 1971 collision in the Panama Canal led to the loss of a cargo of rice. The plaintiff law firm named the Socialist Republic of Vietnam along with three foreign corporations as defendant-claimants in the interpleader action. Vietnam asserted its rights to funds, but also asserted its right to immunity as a foreign sovereign under the Foreign Sovereign Immunities Act. *Id.* at 555-56. The court rejected Vietnam's claim of immunity, under the counterclaim and waiver exceptions to sovereign immunity, but also went on to explain that because the court had *in rem* jurisdiction, it would have proceeded with the interpleader, even in Vietnam's absence, and would have been "enabled to determine title under 28 U.S.C. § 1655 and would necessarily award the funds to the Reinsurers, the only parties appearing." *Id.* at 558. This court also ruled that "there is no political question raised in addressing the conflict between the parties." *Id.* at 568.

and Power Dist., 276 F.3d 1150, 1162-63 (9th Cir. 2002), which the Republic cites, the court dismissed the claim only after determining that three potential "viable alternative forum[s]" existed – a suit on behalf of the plaintiff brought by the United States, a suit brought on behalf of the plaintiff by the Equal Employment Opportunity Commission, and a suit by the plaintiff in tribal court. (As explained in Section D below, courts have frequently ruled against an indispensability claim in cases involving claims of immunity by the United States, the 50 states, and Indian tribes, and such evaluations are always fact-specific.) *Id.*

When the litigant is a foreign government outside the jurisdiction of U.S. courts, however, such alternative means to address and resolve the dispute do not exist, and a dismissal of the claim would leave the dispute unresolved. Thus, the fourth Rule 19(b) factor – "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder" – becomes crucial. The Human Rights Victims would not have had an adequate remedy if the present interpleader action had been dismissed, and, hence, the lower courts ruled correctly in deciding that the Rule 19(b) factors, taken together, required a conclusion that the Republic was not an indispensable party and that the interpleader should not be dismissed.

The approach sought by the Republic would permit any miscreant foreign sovereign to claim an interest – with little or no evidentiary basis – in a particular litigation in the United States but successively assert sovereign immunity and indispensability to preclude adjudication. In this case, such an approach would further require a federal court with *in rem* jurisdiction over specific assets to abdicate jurisdiction to a foreign court. Such an approach would be inconsistent with the commitment to the rule of law approved by this Honorable Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731, 732 (2004) (indicating approval of the approach and analysis found in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and in *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994)).

C. Evaluating the Claim of the Party Seeking "Indispensability" Status Is Necessarily a Part of the Rule 19(b) Balancing Process

The Republic contends that the Ninth Circuit erred in "assessing the strength of the sovereign's claim in the sovereign's absence and making the outcome turn on whether, in the court's view, the sovereign is entitled to prevail on the merits." ROP Pet. at 17. The Ninth Circuit did not, however, inquire into the merits of the Republic's asserted claim, but instead assumed the validity of the claim and determined that even if it is valid it could not be invoked by the Republic to gain the interpleaded assets because the Republic was barred by the statute of limitations from pursuing this claim. ROP App. 8a. The District Court made the factual finding that the Republic was aware of the Arelma account established at Merrill Lynch since 1986: "The Republic has been aware of the deposit since 1986 when the government of Corazon Aquino was installed," and even had a U.S. court freeze the account at Merrill Lynch in 1987.[11] ROP App. 47a, 56a. At pages 3-4 of its petition, the Republic acknowledges that it was aware of the Arelma assets, but has taken no steps to recover them in the United States, even though it has filed more than a dozen lawsuits regarding other Marcos assets in this country. ROP Pet. at 3-4.

Rule 19(b), the predicate for dismissal, asks whether a necessary party's claim would be "impaired" if the dispute is adjudicated without the "necessary" party. This Court has made it clear that lower courts must evaluate the status of the claim presented by a party as part of its Rule 19(b) balancing process:

To say that a court "must" dismiss in the absence of an indispensable party and that it "cannot proceed" without him puts the matter the wrong way around: a court does

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[11] Obviously, the Republic made no assertion of sovereign immunity when it requested a U.S. Court to freeze the Arelma account at Merrill Lynch. *See* ROP App. 47a.

not know whether a particular person is "indispensable" until it has examined the situation to determine whether it can proceed without him.

Provident Tradesmens Bank, 390 U.S. at 119. This Court has emphasized that no "litmus test" formula can be applied to the variety of situations controlled by Rule 19(b), and that no test or "generalization" can serve as "a substitute for the analysis required by that Rule." *Id.* at 124.

In order for a party's claim to be "impaired," it must be shown that a "necessary" party has a "legally protectible claim," not merely a potential claim. *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002) (finding that the Indian tribe had a "substantial" interest that "arises from terms in bargained contracts"); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990).

The expiration of the statute of limitations on the Republic's misappropriation claim is a valid basis for concluding the Republic is not an indispensable party. *See Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1408 (11th Cir. 1998) (" . . . the provisions for joinder of parties under Rules 19 and 21 are not immune from statutes of limitations."); *Young v. United Steelworkers of America*, 49 F.R.D. 74, 75-76 (E.D. Pa. 1969) (allowing a claim to proceed without a potential defendant who could not be sued because the statute of limitations had run against this defendant, noting that dismissal would leave plaintiff "with *no* remedy, let alone an *adequate* remedy" (emphasis in original) and that no potential prejudice against the absent party had been identified). *See also, Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 86 (4th Cir. 1973), *cert. denied*, 415 U.S. 935 (1974).

The Ninth Circuit could also have found that the Republic had an adequate alternate remedy. The Republic could pursue its forfeiture claim on the Merrill Lynch account against the Marcoses in the Philippines and, if successful, satisfy its money judgment by execution on the large number of valuable Marcos real properties in the Philippines which have been sequestered by the government for the past 20 years. Pls.' Reply Mem. at 6 (Dkt. No. 312).

D. Many Courts Have Allowed Actions to Proceed Even in the Absence of an Important Party If Equity and Justice So Require

Many courts, in many circumstances, have allowed civil actions to proceed even when important parties are missing. Indeed, it has been noted numerous times that "[i]n general, 'the philosophy of present Rule 19 is to avoid dismissal wherever possible.'" *Narragansett Tribe of Indians v. Southern Rhode Island Land Dev. Corp.*, 418 F. Supp. 798, 813 n.5 (D.R.I. 1976) (*quoting Heath v. Aspen Skiing Corp.*, 325 F. Supp. 223, 229 (D. Colo. 1971)). This Court has explained that "[a] court of equity will strain hard" to avoid dismissal. *Bourdieu v. Pacific Western Oil Co.*, 299 U.S. 65, 70 (1936).

Many of the cases raising Rule 19(b) issues involve claims brought by Indian tribes, where the United States Government is the missing party, because its sovereign immunity protects it from being brought into the lawsuit against its will. Many courts have allowed such claims to proceed without the United States, and the courts have been particularly influenced by the potential consequence of a contrary ruling – *i.e.*, that the lawsuit could not be pursued, and thus, that the underlying dispute would continue to fester.

In *Davis v. United States*, 192 F.3d 951 (10th Cir. 1999), the Tenth Circuit, reversing the dismissal of a case involving an Indian tribe, held that tribal sovereign immunity did not necessarily make the Tribe indispensable. That court stated that sovereign immunity does "not abrogate the application of Rule 19(b), whose factors this court has applied to Indian tribes in several cases. (citations omitted.)" *Id.* at 960. Years earlier in *Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d 456, 460-61 (10th Cir. 1951), *cert. denied*, 343 U.S. 919 (1952), the Tenth Circuit noted that "[m]ore than twenty years have elapsed and the United States has failed to bring an action, in behalf of the Nations," and that "[i]f we hold that the United States is an indispensable party, the Nations will be unable to prosecute a suit to establish their title to, and

recover the possession and use of, their lands predicated upon an alleged cause of action which arose more than twenty years ago." *Id.* Even though proceeding with the suit might well require the defendants to undertake "the burden and expense of defending two lawsuits" (*i.e.*, a second one brought by the United States), the court ruled that "the equities presented by the situation and the inconveniences that will result . . . weigh heavily in favor of the Nations." *Id.* Similarly, in *Narragansett Tribe of Indians, supra*, the court allowed an action brought by the tribe against the State of Rhode Island and other defendants to proceed even in the absence of the United States, which could not be sued because of its sovereign immunity. The court concluded that because the "likely consequence that a finding of indispensability herein would effectively deny plaintiff any remedy," it would be improper to find that the United States was an indispensable party and thus exclude the tribe from trying to vindicate its rights. *Id.* at 812-13.

These Indian cases rest to some extent "on the unique protection to be accorded Indian wards," *id.* at 813 (D.R.I. 1976), but it should be noted that Human Rights Victims are also subjects of unique protection under international law because of their well-established right to obtain compensation for their suffering.[12] Indeed, enabling victims of *jus*

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[12] As the Swiss Federal Supreme Court recognized in its 1997-98 decisions transferring Marcos assets to an escrow account controlled by PNB, the duty of a successor government to provide compensation to those whose human rights have been abused by a previous government is firmly established in international law. *In re Federal Office of Police Matters*, No. 1A.87/1997 (Switz. Sup. Ct. Dec. 10, 1997) at 36-39; *see also*, Int'l Covenant on Civil and Political Rights, Dec. 16, 1966, art. 2(3)(a), 999 U.N.T.S. 171 (which has been ratified by more than 140 countries including the Philippines and the United States) which says that "[e]ach State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity. . . ."; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 14, 23 I.L.M.

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cogens violations of fundamental human rights to receive compensation for their suffering and loss, as required by international law, could well be characterized as serving a public good and falling within the "public rights" exception to the indispensable party requirements. *See Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988) (weighing the claim of indispensability in light of the "public rights" exception and the fact that the interests of the parties claiming to be indispensable had been protected by other parties in the litigation).

Courts have refrained from dismissing actions even when important parties are missing in many non-Indian cases. In *Imperial Appliance Corp. v. Hamilton Mfg. Co.*, 263 F. Supp. 1015 (E.D. Wis. 1967), for instance, the court allowed the action to proceed after determining that joinder was not feasible because there was no alternative forum in which plaintiffs could maintain the action against all interested parties. Among the many other cases that have held similarly include *Mescalero Apache Tribe v. State of New Mexico,* 131 F.3d 1379, 1384 (10th Cir. 1997) (ruling that the United States was not an indispensable party after engaging in a weighing process and emphasizing that "the interests of judicial efficiency counsel strongly against dismissing this action at this point"); *Wyandotte Nation v. City of Kansas City, Kansas*, 200 F. Supp. 2d 1279, 1297-98 (D. Kan. 2002) (ruling that the United States was not an indispensable party after weighing relevant factors, and emphasizing the lack of an

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1027 (1984), *modified*, 24 I.L.M. 535 (1985), stating that "[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation"; *see also, e.g., The Velasquez Rodriguez Case*, 4 Inter-Am. C.H.R. (ser. C) (1988), *reprinted in* 28 I.L.M. 291 (1989) (holding that the American Convention on Human Rights imposes on each state party a "legal duty to . . . ensure the victim adequate compensation"). The Republic's violation of its obligations under international law to provide remedies to human rights victims must be part of the equation guiding this Honorable Court as it weighs the factors governing applicability of Rule 19(b) of the Federal Rules of Civil Procedure.

alternative remedy for the plaintiff); *Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001) (holding that the tribe was not an indispensable party); *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250 (10th Cir. 2001) (same); *U.S. ex rel. Steele v. Turn Key Gaming, Inc.*, 135 F.3d 1249 (8th Cir. 1998) (same); *Dairyland Greyhound Park, Inc. v. McCallum*, 258 Wis.2d 210, 655 N.W.2d 474 (Wis. 2002) (same).

II. THE NINTH CIRCUIT'S RULING DOES NOT UNDERCUT ANY OF THE REASONS UNDERLYING THE DOCTRINE OF FOREIGN SOVEREIGN IMMUNITY

The Republic presents a "parade of horribles" argument – contending that relations between the United States and the Philippines will deteriorate and that Philippine courts will be reluctant to enforce U.S. court orders if this Honorable Court does not reverse the decision below. ROP Pet. at 11, 25-30. As this Court explained in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), however, Congress enacted the Foreign Sovereign Immunities Act in 1976 for the purpose of taking the determination of immunity out of the realm of politics and establishing a "comprehensive" "'set of legal standards'" that "'codifies . . . the restrictive theory of sovereign immunity'" and "transfers the primary responsibility for immunity determinations from the Executive to the Judicial Branch." *Id.* at 691 (*quoting Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983)). This statute was passed for the purpose of "clarifying the rules that judges should apply in resolving sovereign immunity claims *and eliminating political participation in the resolution of such claims*." *Id.* at 699 (emphasis added).

The determination of immunity, and the implementation of such a decision in conjunction with other applicable judicial principles, is thus the responsibility of the judiciary, and the judiciary has fulfilled its responsibility carefully and appropriately in this situation. The U.S. courts have expended substantial resources to the important

claims presented by the Filipino Human Rights Victims during the past 21 years of litigation, including numerous appeals to the Ninth Circuit and applications for certiorari to this Honorable Court during that period.

Earlier in the human rights litigation, the Philippine government submitted an *amicus curiae* brief urging that the "U.S. courts should adjudicate the Human Rights Victims' claim against Marcos" and stating clearly that "foreign relations with the United States will *not* be adversely affected if these human rights claims against Ferdinand Marcos are heard in U.S. courts." *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d at 1472 (*quoting* the Republic's *amicus curiae* brief; emphasis in the original brief). The U.S. courts acted in conformity with that request, and, after contentious adjudication, the decision below provides the opportunity to provide modest compensation to the Victims who have suffered so much, and their heirs. This distribution will vindicate transcendent values shared by the United States and the Philippines and, indeed, the entire world community. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 731, 732 (2004) (indicating approval of the approach and analysis found in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and in *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467); and *id.* at 728 (recognizing that the Torture Victim Protections Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), has provided "authority that 'establish[es] and unambiguous and modern basis for' federal claims of torture and extrajudicial killing").

Belying the Republic's arguments and recent diplomatic note (ROP App. 65a) regarding the sensitivity of this case are hearings held by the U.S. Congress on March 14, 2007, investigating 295 "extrajudicial" killings in the Philippines, which the U.S. Department of State says are attributable to the Philippine military under the Arroyo administration. In an interview on March 11, 2007, the Philippines National Security Adviser, Norberto Gonzales, said "the inquiry was neither an affront to the country's sovereignty nor a breach of courtesy among nations." *See* "Palace Unfazed by US Hearing on Extrajudicial Killings,"

Philippine Daily Inquirer March 11, 2007, http://newsinfo.inquirer.net (and related articles on March 15 and 16). Surely a country unfazed by U.S. Congressional hearings tying its leadership to mass killings cannot be overly sensitive to a judicial interpleader proceeding determining entitlement to assets of a former president that have been in the United States since 1972. The U.S. Executive Branch has not intervened with its views on this litigation despite being solicited to do so by the Republic, and the Republic's request to have this Court formally seek that Branch's views comes much too late in this litigation and would be unproductive.

III. THE NINTH CIRCUIT'S RULING IS NOT IN CONFLICT WITH DECISIONS FROM OTHER CIRCUITS

The Republic does not cite one single decision from another circuit dismissing a claim involving a foreign government on the ground that the foreign government is both immune and indispensable. Disputes involving the United States government, the governments of the 50 states, and Indian tribes are different, because if a claim against one of those governments is dismissed, the matter can be resolved within the U.S. political system by other means. But, when a foreign government is involved, a dismissal would mean that the matter would escape resolution.

For 21 years this case has been before the U.S. courts, which carried forth the adjudication of the claims with the express approval of the Philippine government. *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d at 1472 (*quoting* the Republic's *amicus curiae* brief). Earlier decisions of the Ninth Circuit have been cited with approval by this Court. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 731, 732 (2004) (indicating approval of the approach and analysis found in *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467). The present decision was handled carefully by the Ninth Circuit, it is not inconsistent with the decisions of any other circuits,

and the fact-specific resolution of this matter presents no issue of national importance.

IV. THE NINTH CIRCUIT PROPERLY DENIED THE CLAIMS RAISED BY THE GOLDEN BUDHA AND ROXAS PETITIONERS

Other petitioners, the Estate of Roger Roxas and the Golden Budha Corporation (the "Golden Budha/Roxas petitioners"), primarily argue that the district court lacked jurisdiction or otherwise erred in distributing the assets to the Class for three independent reasons. The Ninth Circuit fully considered and correctly decided that the petitioners have no claim to the assets at issue (ROP App. 10a-11a).

A. The Probate Doctrine Does Not Bar Federal Jurisdiction to the Assets

The Golden Budha/Roxas petitioners first contend that the district court lacked jurisdiction to distribute the assets because the probate exception to federal jurisdiction reserves such action exclusively to state probate courts. GBR Pet. at 10-17. Indeed, for nine years, the Golden Budha/Roxas petitioners have argued to various courts that the probate exception applies to these proceedings and every court has rejected the argument.

Jurisdiction in this statutory interpleader action was not foreclosed by the probate exception, which prohibits federal courts from probating a will or administering an estate. *Markham v. Allen,* 326 U.S. 490, 494 (1946). This Court has ruled that the probate exception to federal jurisdiction is to be construed narrowly, recognizing that federal courts of equity have jurisdiction to entertain suits "'in favor of creditors, legatees, and heris' [sic] and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." *Id.* at 494 (*quoting Waterman v.*

Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 43 (1909)). Recently, this Court, in *Marshall v. Marshall*, 547 U.S. 293, 126 S. Ct. 1735 (2006), further clarified the narrow scope of the probate exception as articulated in *Markham*, explaining that "the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. *But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.*" *Id.* at 1748 (emphasis added) (finding that "the instant case does not fall within the ambit of the narrow exception recognized by our decisions.")

Here, the probate exception does not apply to the Class claims for several reasons. First, the Class claims do not involve purely probate functions, such as the administration of an estate or the probate of a will. Second, the *res* at issue is *not* in the custody of another state or foreign court. In fact, no competing court in the United States or Philippines has ever sought to claim exclusive jurisdiction over the assets in the account. This is particularly compelling because even though Merrill Lynch specifically named Imelda Marcos and several Marcos family members as "defendants" in the interpleader action, none of those individuals ever appeared to claim the assets, and they thus suffered the entry of a default judgment in this matter. Nor did any of the Marcos family members take any subsequent action to have a probate court assert jurisdiction over the assets.

State courts have rejected opening a probate proceeding despite the zealous efforts of the Golden Budha/Roxas petitioners to do so. In *Matter of Estate of Marcos*, 88 Haw. 148, 963 P.2d 1124 (Haw. 1998), the Hawaii Supreme Court expressly rejected the multiple attempts by Irene L. Silverman and the Golden Budha/Roxas claimants to open probate proceedings for the Estate of Ferdinand E. Marcos in Hawai'i following Marcos's death on September 29,

1989.[13] The court highlighted the circuit [probate] court's finding that: "'[T]he property that is the subject of the inquiry in the present petition for reconsideration is not, though it may be in the territorial bounds of the State of Hawai[']i, is not in the Court's opinion, within the state because it is still being held by the United States government.'" 88 Haw. at 151, 963 P.2d at 1127.

Significantly, the Hawaii Supreme Court also examined the successful efforts of the Human Rights Victims to secure assets in proceedings in the District Court for the District of Hawaii such as the recovery of $1,000,000 for the house that Marcos resided in while in Hawaii and the sale at auction of his bullet proof Mercedes. *Id.* at 1128. The Hawaii Supreme Court found that "federal case law dictates that the circuit [probate] court does not have jurisdiction over property in the custody of the federal government." *Id.* at 1132. The Hawaii Supreme Court relied upon *United States v. $119,000 in U.S. Currency*, 793 F. Supp. 246, 250 (D. Hi. 1992), where the federal district court held that the circuit court could not exercise *in rem* jurisdiction over property that was in federal custody at the time of the circuit court proceeding.

> We agree with the federal district court and hold that property in the custody of the federal government is not subject to Hawai'i state courts' jurisdiction where the property was in custody at the time of the Hawai'i state court proceeding. Therefore, inasmuch as the property held by U.S. Customs was in federal custody at the time of all of the circuit court proceedings, it may not serve as the jurisdictional basis for a Hawai'i probate proceeding pursuant to HRS § 560:1-301(2).

88 Haw. at 156; 963 P.2d at 1132. Similarly, the assets at issue in Arelma are in the custody of the District Court for

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[13] Silverman and Golden Budha/Roxas also tried to open Marcos probate proceedings in California. The California Court of Appeal ruled there was no evidence that Marcos owned any property in California. *See Matter of Estate of Marcos*, 88 Haw. at 153, 963 P.2d at 1129.

the District of Hawaii, and the Hawaii Supreme Court has already made it very clear that the courts of Hawaii do not have any interest in such assets. Thus, the Hawaii Supreme Court ruled that the District Court for the District of Hawaii is the proper forum for the Class of Human Rights victims to pursue recovery of its judgment against Ferdinand Marcos and his Estate. Golden Budha/Roxas' assertion that a New York court could adjudicate this matter is also baseless. GBR Pet. at 15-16. No New York probate was ever opened nor was one attempted.

It is well established that once a federal court has entered judgment, it has ancillary jurisdiction over subsequent proceedings necessary to "vindicate its authority, and effectuate its decrees." *Peacock v. Thomas,* 516 U.S. 349, 354 (1996) (internal quotations omitted). This authority extends to proceedings to enforce the judgment. *See* 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3523, at 89 (2d ed. 1984) (Ancillary jurisdiction "include[s] those acts that the federal court must take in order properly to carry out its judgment on a matter as to which it has jurisdiction"). Without ancillary jurisdiction to enforce judgments, "the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution." *Peacock,* 516 U.S. at 356 (internal quotations omitted). As a result of its entry of judgment for the Class of Human Rights Victims, the U.S. District Court for the District of Hawaii possessed ancillary jurisdiction to enforce the judgment through supplementary proceedings within federal jurisdiction.

Accordingly, the probate exception does not apply to the Class claims and the petition should be denied.

B. The Estate of Marcos Is Not an Indispensable Party To This Action

The Golden Budha/Roxas petitioners next argue that the lower court lacked federal jurisdiction over the assets because the Estate of Marcos is an indispensable party

that was absent from the proceedings. GBR Pet. at 17-18. This argument is baseless.[14]

As an initial matter, contrary to the contention of the Golden Budha/Roxas petitioners, the Estate was, in fact, named as a defendant in the interpleader action. Paragraph 5 of the Amended Complaint for Interpleader alleges that "[u]pon information and belief, Imelda R. Marcos and Ferdinand R. Marcos, Jr. are citizens of the Republic of the Philippines . . . are legal representatives of the Estate of Ferdinand E. Marcos (the "Estate"), and are beneficiaries of the Estate." Am. Compl. for Interpleader at 3 (Dkt. No. 102). Although named in the Amended Complaint and served, neither Imelda nor Ferdinand R. Marcos made an appearance in the proceedings and a default was entered against them. The default has never been contested. Thus, their failure to appear cannot be used as a sword to argue a lack of jurisdiction under Rule 19(b).

These jurisdictional issues are irrelevant as they apply to the Golden Budha/Roxas petitioners, which have failed to prove to any court that they have any direct claim to the assets at issue. The District Court denied their claim to the Arelma/Merrill Lynch assets on the grounds that the judgment that they based their claim upon was solely against Imelda Marcos, in her personal capacity, and not against the Estate of Ferdinand E. Marcos. ROP App. 53a-54a. Because the disputed assets were those of Ferdinand Marcos, and not Imelda, the District Judge ruled that the claim of the Golden Budha/Roxas claimants, "if any, is junior to the claim of the Filipino Judgment Creditors in MDL No. 840." ROP App. 49a. This ruling is clearly correct. Although they had the opportunity to do so, the Golden Budha/Roxas petitioners introduced no evidence that their assets were stolen by Ferdinand Marcos in 1971 or that the proceeds thereof are traceable to the

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[14] In six years of the interpleader litigation, the Golden Budha/Roxas petitioners have never raised this argument previously, and should be precluded from raising it now, as the issue was not preserved below.

Arelma account at Merrill Lynch. Thus, because they failed to prove a direct claim to the assets at issue, they should be precluded from raising jurisdictional issues.

Furthermore, contrary to petitioners' contention, the Estate is not an indispensable party under Rule 19(b) of the Federal Rules of Civil Procedure. Applying the four factor test, it is clear that a judgment rendered in favor of the Class to recover all of the assets in the absence of the Estate caused minimal prejudice, if any, to the Estate and need not be lessened. Indeed, the non-prejudicial effect is evidenced by the non-action of the members of the Marcos Estate's personal representatives, who despite being named as defendants in the interpleader action, have taken no steps to claim the assets or to bring a probate action or to claim that the Estate is indispensable. *See Gardiner v. Virgin Islands Water & Power Auth.*, 145 F.3d 635, 641 (3d Cir. 1998)) (finding that the U.S. was not indispensable and stating "the United States does not want to become a party to the suit, strongly suggesting that its interests will not be impeded if the suit goes forward without it."); *Sokaogon Chippewa Community v. State of Wisconsin, Oneida County*, 879 F.2d 300, 304 (7th Cir. 1989) (finding that the U.S. was not indispensable and stating that the U.S.'s failure to take any position as to its indispensability shows that "it must not fear the consequences of a judgment in this suit."). In fact, a default judgment was entered against them in this action and remains uncontested. Furthermore, petitioners' contention that the distribution of Estate assets in the absence of an estate is *per se* prejudicial is incorrect. GBR Pet. at 18. The judgment rendered in the absence of the Estate was certainly adequate and fair. Even more compelling is the fact that the Class claims could not be effectively litigated in another court. Accordingly, the Estate of Marcos is not an indispensable party and the petition should be denied.

C. The Claims of Pimentel and the Class of Human Rights Victims Were Cognizable in an Interpleader Action

The Golden Budha/Roxas petitioners' third jurisdictional argument contends that Pimentel and the Class of Human Rights Victims have no direct claim to the assets at issue because they are not adverse to a specific identified fund or party. GBR Pet. at 18-23. This argument also is meritless.[15]

The record is clear that Pimentel and the Class filed a timely action for these assets against Merrill Lynch and Arelma on September 6, 2000 asserting (1) that Arelma was the *alter ego* and instrumentality of Ferdinand E. Marcos and his Estate, their judgment debtor, and (2) demanding that the funds in Arelma's account at Merrill Lynch be paid over to Pimentel and the Class. *See Pimentel v. Merrill Lynch*, No. 00-580 (D. Hi. 2000); Dkt. No. 56 at 6. Pimentel and the Class reiterated this claim in their Amended Answer and Claim in Interpleader. Am. Answer and Claim in Interpleader at 4 (Dkt. No. 117). Pimentel and the Class withdrew the action after Merrill Lynch agreed to deposit the assets with the U.S. District Court for the District of Hawaii. Dkt. No. 56 at 5-6. These claims establish the requisite adversity between Pimentel and the Class, on one hand, and Merrill Lynch on the other hand.

For centuries the law has recognized that judgment debtors often try to evade payment of judgments by keeping their assets with a third party. The law is fashioned to

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[15] Neither in their Answers to the Amended Complaint (Dkt. No. 8), nor in the Joint Pretrial Memorandum (Dkt. No. 338), did Golden Budha/Roxas assert that Pimentel and the Class lacked sufficient adversity to Arelma and the fund. Moreover, Golden Budha/Roxas admitted in their Answer that there are conflicting claims to the ownership of the fund. *See* GBR Answer to Am. Compl. at 6 (Dkt. No. 113). The Golden Budha/Roxas petitioners improperly raised this issue for the first time in their appeal to the Ninth Circuit and here, again, even though the issue was not preserved below.

permit judgment creditors to pursue remedies against third parties so that just debts, like the one owing to the human rights victims, can be collected. The cases cited by Golden Budha/Roxas have no bearing on the facts of this case. For example, cases cited by the petitioners involve a plaintiff debtor that requires its general judgment creditor to collect on its judgment against a specific contested fund in an interpleader. *See, e.g., Airborne Freight Corp. v. United States*, 195 F.3d 238, 241-42 (5th Cir. 1999). This Court recognizes the standing of judgment creditors in interpleader actions. *See, e.g., United States v. McDermott*, 507 U.S. 447, 455 (1993). No case holds that a judgment creditor cannot be a proper claimant to an interpleaded fund where that fund can partially or fully satisfy the judgment.

D. The Ninth Circuit's Opinion Did Not Effectively Deny The Golden Budha/Roxas Petitioners' Right To Appeal

The Golden Budha/Roxas petitioners also contend that their right to appeal was denied when the Ninth Circuit failed to address their jurisdictional arguments in its written opinion, thereby purportedly depriving them "of a meaningful right of appeal." GBR Pet. at 23-27. The argument is disingenuous at best.

Even petitioners concede in their brief that the Ninth Circuit did not ignore their submissions. GBR Pet. at 24-26. Rather, in its opinion dated September, 12, 2006, the Ninth Circuit provided a well-reasoned basis for denying the claims of Roxas and Golden Budha, stating in pertinent part:

> The district court, however, found that Roxas had not proven that the assets in the Arelma account derived from any treasure stolen from him. Roxas contends that the district court erred in excluding expert testimony regarding the source of the funds and in excluding depositions of fact witnesses from his earlier action against Marcos.

> We do not believe that the district court abused its discretion in either ruling.
>
> * * *
>
> As the district court held, Roxas's tort judgment is against Imelda Marcos personally. It does not bind the Marcos estate. Roxas has no claim to be satisfied here.

ROP App. 10a-11a. Having disposed of the Golden Budha/Roxas petitioners' claims on the grounds that they had failed to prove a direct claim or even a factual basis to any of the assets, the Ninth Circuit was not obligated as a matter of law to address every argument that petitioners raised in their brief. *See, e.g., Alaska v. United States*, 545 U.S. 75, 91 (2005); *S.E.C. v. Sloan*, 436 U.S. 103, 109 n.2, 3 (1978). Accordingly, the petitioners' argument is without merit and does not warrant review.

CONCLUSION

The Ninth Circuit followed the law in ruling that the interpleaded assets should be distributed to the Class of Filipino Human Rights Victims in partial satisfaction of their judgment against the Estate of Ferdinand E. Marcos. Accordingly, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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